Supreme Court, U.S.
FILED

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No.

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In The
**Supreme Court of the United States**

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YURI J. STOYANOV,
*Petitioner*

v.

DEPARTMENT OF THE NAVY,
*Respondents.*

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On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Federal Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

As a last resort for legal remedies, Petitioner appeals to this Court to vacate the appeals court decision, which conflicted with the court's own opinion "that the suspension of an employee because of denial or revocation of a security clearance could not be sustained when the agencies involved did not provide the employee with sufficient information to make an informed reply to the agency." See *Cheney v. Department of Justice*, 479 F.3d 1352 (Fed. Cir. 2007). The appeals court decision also raises questions of exceptional importance and conflicts with the Board's holding that an employee remains on an agency's payroll until the suspension is effected; *Boudousquie v. Department of the Air Force*, 102 MSPR 397 (2006) at ¶10; in addition to contradicting the Board Chairman's finding "on the current record that the appellant is entitled to back pay for the time period that he has been suspended without adequate notice of the reasons for the suspension of his security clearance." The appeals court conflicting decision raises the following questions of exceptional importance:

1. Whether employee's right to the employer's evidence and an opportunity to present his side of the story were violated when internal appeal procedures were denied within the agency through which to object the adverse decision on security clearance issues?

2. Whether a notice of reasons for suspension of access to classified information is inadequate in its entirety when one or more reasons for suspension are vague to make a meaningful reply to the notice of suspension from work under 5 U.S.C. §7513?

## LIST OF PARTIES

YURI J. STOYANOV,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondents

## CERTIFICATE OF INTEREST

The Petitioner Yuri Stoyanov certify the following:

1. The full name of every party or amicus represented by me is: None
2. The name of the real party in interest represented by me is: None
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None
4. There is no such corporation as listed in paragraph 3
5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: None

19 Feb 2010 — Date

Yuri Stoyanov — Yuri Stoyanov

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## OPINIONS BELOW

1. U.S. Court of Appeals for the Federal Circuit, Docket No. 2009-3163, (MSPB No. DC0752080466-I-1) November 23, 2009 ORDER. (Appendix page A1)

2. U.S. Court of Appeals for the Federal Circuit, Docket No. 2009-3163, (MSPB No. DC0752080466-I-1)) September 15, 2009, Nonprecedential Per Curiam Opinion (Appendix p. A2)

3. Separate Opinion of MSPB Chairman Neil A. G. McPhie, MSPB No. DC0752080466-I-1, March 11, 2009 (Appendix p. A12)

4. MSPB Final Order, March 11, 2009, MSPB No. DC0752080466-I-1, (Appendix p. A11)

5. MSPB, Initial Decision, August 11, 2009, MSPB No. DC0752080466-I-1, (Appendix p. A21)

## JURISDICTION

The U.S. Court of Appeals for the Federal Circuit issued Order denying timely petition for panel rehearing and rehearing en banc on November 23, 2009. The Supreme Court has jurisdiction in exercising its power of review of this matter pursuant to 28 U.S.C. 1253-1254. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

## STATUTES INVOLVED IN THIS CASE

5 U.S.C. § 7513; 5 U.S.C. 2302(b)(8) Whistleblower Protection Act, ("WPA"); 5 U.S.C. §§2301-2302.

## STATEMENT OF THE CASE

As a last resort for legal remedies, Petitioner Dr. Yuri Stoyanov submits for the Court's consideration and judgment to vacate the appeals court decision, which contradicted findings in the Board Chairman Neil A. G. McPhie's Separate

Opinion at A12 ¶ 1: "I believe the Board should find that the appellant's 5 U.S.C. § 7513 (b) right to notice of the reasons for suspension of his access to classified information has been violated." In addition, the petition for a writ of certiorari should be granted because of exceptional importance since "[t]his case stands at the intersection of *Department of the Navy v. Egan*, 484 U.S. 518 (1988) and *Cheney v. Department of Justice*, 479 F.3d 1343, 1351 (Fed. Cir. 2007)" as the Board Chairman asserted and the facts presented below support Petitioner's cause:

1) Petitioner appeals to this Court to exercise supervisory power and vacate the appeals court decision, which conflicted with the appeals court's own opinions and the Board Chairman's finding that the appellant is entitled to back pay for the time period that he has been suspended without adequate notice of the reasons for the suspension of his security clearance.

2) Petitioner works for the Navy as career appointment Scientist at the Carderock Division in West Bethesda MD. On February 4, 2002, both Petitioner Dr. Yuri Stoyanov and his brother Dr. Aleksandr Stoyanov filed first EEO discrimination complaints after promotion was denied in the most egregious act of intentional age discrimination against Petitioner (DOB 4/7/1955, born in Russia) when a significantly younger (over 14 years) individual with far inferior qualifications was promoted to the ND-5 Interdisciplinary Manager position under circumstances giving inference of discrimination by the selecting official.

3) Petitioner was also denied promotions and assignments to more than six ND-5 positions, which were filled without any vacancy announcements

when other significantly younger individuals with inferior qualifications than Petitioner's qualifications were assigned to a position and then secretly promoted under pretext of accretion of duties to cover up intentional discrimination against Petitioner. The other ND-5 positions competed through vacancy announcements at the Carderock Division were also filled by fraudulent manipulations of the selection process to deny Petitioner promotion. Petitioner was denied promotions and assignments to at least eleven (11) ND-5 positions while younger employees with inferior qualifications were promoted because of discrimination and retaliations against Petitioner for participation in protected activities.

4) One month after Petitioner filed formal EEO discrimination complaint in March 2002, the management escalated discrimination and retaliations and by fraud transferred Petitioner Dr. Yuri Stoyanov to another technology department from the department where he worked for over fifteen years. Petitioner filed additional EEO discrimination complaints and disclosed violations of laws through the chain of the Navy command and to the US Office of Special Counsel (OSC).

5) Instead of implementing remedial measures, the management escalated discrimination and retaliations against Petitioner for participation in the EEO discrimination complaint activities and Whistleblowing activities. Petitioner was denied promotion and retaliated against by the Defendants excluding Petitioner from managing projects, denying directly funded work, interfering with Petitioner's projects, redirecting funding, creating hostile working conditions, imposing discriminatory requirements, using threats of disciplinary action,

denying incentive pay, intentionally deceiving to deny requests for vacancy announcements, concealing and failing to properly post job announcements to deny Petitioner promotion.

6) The Carderock administration failed to implement the Navy policy of zero tolerance to discrimination in spite of the EEOC finding intentional discrimination in the first case as Petitioner and his brother proved during administrative process at the EEOC. In another EEOC discrimination case the EEOC Administrative Judge (AJ) again found that the management officials discriminated, however, the agency administration again failed to implement remedial measures and the Navy policy of zero tolerance to discrimination. In 2005 and 2006, the EEO Commission Office of Federal Operations (EEOC-OFO) upheld found discrimination in the both EEOC cases and ordered the agency to take appropriate disciplinary action against the responsible management officials. As a result of failures to take immediate remedial measures and comply with laws and the Navy policy, the management officials further escalated discrimination and retaliations against Petitioner.

7) In June 2005, Petitioner filed civil actions against the management officials individually and in their official capacity to recover damages and restore justice because of egregious discrimination and violations of the Petitioner's rights. In September 2005, management officials retaliated against Petitioner and threatened to suspend him from work. The management officials escalated discrimination against Petitioner and issued false performance evaluation, imposed discriminatory restrictions,

denied promotion, and issued a Letter of Reprimand in November 2005. Petitioner filed complaints of prohibited personnel actions with the OSC, additional EEO discrimination complaints, disclosures through the chain of command and appeals to the MSPB and civil actions in the Federal District Court. In 2006, Petitioner repeatedly appealed to the EEO Chief and Commander Captain Thomas at the Carderock Division to end continuous escalation of discrimination and to enforce compliance with laws and the Navy policy of zero tolerance to discrimination. Petitioner specifically disclosed to Captain Thomas corruption of the administrative process, deliberate violations of laws, intentional misrepresentations, and obstruction of justice committed by the agency representative Mr. Caron with the third level supervisor Mr. King and his subordinates. Petitioner requested remedial actions because the EEOC already twice found intentional discrimination and the Navy policy called for removal of Mr. King, Mr. Wilson, and Mr. Caron because of their violations and abuse. In December 2006, Petitioner also disclosed violations up the chain of command to Admiral Macy because Captain Thomas failed to take any remedial actions and comply with the Navy policy of zero tolerance to discrimination at the Carderock Division. In January 2007, Petitioner further disclosed violations of specific statutes by the management officials to the Navy Inspector General and the Secretary of the Navy in addition to the fact that Admiral Macy and Captain M. Thomas ("Thomas") failed to enforce the Navy policy and denied Petitioner's appeals.

8) On February 2, 2007, Thomas retaliated against Petitioner and issued a notice of intent to

suspend access to classified information and assignment to a sensitive position in reprisal for Petitioner's participation in protected EEO and Whistleblowing activities. On February 5, 2007, Petitioner requested from Thomas extension of time to respond to the February 2, 2007 Notice of Intent to Suspend Access to Classified Information and Assignment to a Sensitive Position and specifically requested all documents mentioned in the February 2, 2007 Notice. However, by a Notice to Indefinitely Suspend Access to Classified Information and Assignment to a Sensitive Position dated February 7, 2007, Thomas denied Petitioner's February 5, 2007 request for the documents and the extension of time to respond to the allegations in the February 2, 2007 Notice. On March 8, 2007, in response to certified mail containing Notice of Proposed Indefinite Suspension from the first level supervisor Mr. Mayo backdated as of February 15, 2007, Petitioner requested extension of time and the copies of all the documents and records pertaining to the February 2, 2007 Notice to properly respond to the allegations in the February 2007 Notices because the charges alleged in the Notices were vague, failed to provide sufficient information to make an informed reply, and Petitioner had reasonable believe that the suspension of security clearance was based on fabrications to retaliate for his participation in protected activities. The agency officials deliberately failed to provide Petitioner any evidence and documents upon which suspension was based because the interests of national security had been unlawfully used as a cover to suspend security clearance in an attempt to remove Petitioner from work. Since February 2007, Petitioner was denied

internal appeal procedures within the agency through which to object the adverse decision on security clearance issues prior to the constructive suspension from work without pay.

9) The evidence in the record showed that the constructive suspension without pay in April 2007 for over 370 days was unlawful in its entirety because on April 10, 2008, the Personnel Security Appeals Board (PSAB) and the Defense Office of Hearing and Appeals (DOHA) rejected the 2007 fabricated accusations to constructively suspend Petitioner from work and issued a decision directing the agency to reinstate Petitioner's security clearance and assignment to sensitive position. On April 30, 2008, Petitioner was notified that effective April 27, 2008 the indefinite suspension was terminated and Petitioner was reinstated to work and ordered to return to work duties starting May 5, 2008.

10) Petitioner filed Individual Right of Action (IRA) appeals with the regional MSPB office; however, the regional MSPB AJ made erroneous interpretation of facts and laws in the initial decisions contrary to the evidence that the agency failed to follow procedural safeguards, committed harmful errors, and violated agency-own procedures when the agency deciding officials failed to provide Petitioner minimal due process and constructively suspended Petitioner without pay effective April 15, 2007. On March 28, 2008, the Board granted Appellant right to file the adverse action appeal regarding indefinite suspension from work without pay and AJ again made erroneous interpretation of facts and laws in the initial decision.

11) Petitioner filed with the Board another petition for review and on March 11, 2009, the Board Chairman Neil A. G. McPhie issued Separate Opinion concluding at A21 ¶13: "rather than finding on the current record that the appellant is entitled to back pay for the time period that he has been suspended without adequate notice of the reasons for the suspension of his security clearance, I would remand the case...;" however, the case was not remanded because the two Board members could not agree on the disposition of the petition for review.

12) The Board Chairman's Separate Opinion superseded the erroneous and arbitrary findings in the AJ's initial decision; however, the appeals court nonprecedential decision in this case far departed from its own decisions in *Cheney* and contradicted the Board Chairman McPhie's Separate Opinion. See at A1. The erroneous and contradictory appeals court opinion raised the precedent setting questions of exceptional importance that call for granting petition for a writ of certiorari.

## ARGUMENTS FOR ALLOWANCE OF THE WRIT

Petitioner appeals and presents compelling reasons to grant petition for a writ of certiorari because "[t]his case stands at the intersection of *Department of the Navy v. Egan*, 484 U.S. 518 (1988) and *Cheney v. Department of Justice*, 479 F.3d 1343, 1351 (Fed. Cir. 2007)" and the appeals court's decision in this case contradicted the Board Chairman McPhie's Separate Opinion that superseded the erroneous and arbitrary findings in the AJ's initial decision, which wrongly applied *Hesse v. Department of State*, 217 F.3d 1372 (Fed. Cir.

2000), instead of *Cheney*, 479 F.3d 1343, 1351 (Fed. Cir. 2007).

The appeals court's decision contradicted the findings by the Board Chairman in this case that superseded the AJ's clearly erroneous interpretation of material facts and law in the initial decision based on *Hesse* when "the agency twice advised the appellant of the specific reasons for his security clearance suspension and twice provided him an opportunity to respond to that action" (emphasis added) while in the current case Petitioner was denied specific reasons and was repeatedly denied documents explaining the evidence to reasonably present the Petitioner's side of the story for internal appeal procedures within the agency through which to object the adverse decision on security clearance issues prior to the indefinite suspension without pay. The appeals court far departed from its own decision in *Cheney* by affirming the erroneous initial decision at A3: "for review of matters related to security clearance is limited to the question of due process in accordance with *Department of the Navy v. Eagan*, 484 U.S. 518 (1988)" that clearly contradicted the Board Chairman's finding when one of the reasons in the notice of intent to suspend access to classified information "is at least as vague as the reasons contained in the notice deemed inadequate in *Cheney*." See at A19 ¶11. The evidence is clear that neither *Hesse*, 217 F.3d 1372 nor *Eagan*, 484 U.S. 518 (1988) were directly controlling this case because the Appellant's security clearance was reinstated and the merits of the security clearance suspension were not at issue while the WPA permits employees, after seeking review from the Office of Special Counsel, to obtain review of claims that they have been subjected

to adverse personnel actions in retaliation for participation in whistleblowing and protected activities. Unlike *Egan*, this case involves a claim of retaliation and suspension from work for more than 370 days that was a "prohibited personnel practice" under the statute protecting whistleblower disclosures, 5 U.S.C. § 2302. And unlike *Hesse*, the Petitioner's security clearance was reinstated and Petitioner in this case was denied internal appeal procedures within the agency through which to object the adverse decision on security clearance issues prior to the indefinite suspension from work without pay. In addition, unlike *Hesse*, the agency failed to provide Appellant any evidence that led to suspension of his security clearance and "the appellant's 5 U.S.C. §7513 right to notice of the reasons for suspension of his access to classified information has been violated" as the Board Chairman found in the Separate Opinion at A12 ¶ 1. The precedent setting questions of exceptional importance and departures of the lower court from its own precedential decision in *Cheney* and the Board's findings in the Separate Opinion are compelling reasons to grant petition for a writ of certiorari and vacate the appeals court decision using the Court's supervisory power.

## RETALIATIONS FOR PROTECTED ACTIVITIES

The undisputed evidence in the record clearly established that the avoidable procedural errors, violations of the Petitioner's rights, and the decision to constructively suspend Petitioner from work without pay were in retaliation for the Petitioner's participation in protected activities. The causal

connection between the prohibited personnel actions and the Petitioner's participation in protected activities were contributing factors to indefinitely suspend[1] Petitioner from work without pay. The nature and specificity of the Petitioner's claims that the agency initiated his absence from work shortly after Petitioner disclosed violations of specific statutes by the management officials in January 2007 and Petitioner was constructively suspended from work without pay for more than 370 days in April 2007 without internal appeal procedures within the agency through which to object the adverse decision on security clearance issues prior to the indefinite suspension prove the claim of intentional retaliation as this Court concluded that the anti-retaliation provisions are violated whenever the employer responds to protected activity in such a way that a reasonable employee would have found the challenged action materially adverse. See *Burlington N. & S.F. Ry. v. White*, 26 S. Ct. at 2415

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[1] The nexus of the Appellant's participation in Whistleblowing activities in January 2007 and the aborted attempt to remove Appellant from the Scientist position in February 2007 by abusing the interests of national security further supported Appellant's claim of intentional retaliations as Appellant was denied any evidence that led to suspension of his security clearance when "the appellant's 5 U.S.C. §7513 right to notice of the reasons for suspension of his access to classified information has been violated" as the Board Chairman McPhie found in the Separate Opinion. The Appellant's protected disclosures were within the meaning of the WPA since reporting repetitive violations of even minor rules or regulations can constitute a protected disclosure. See *Eidmann v. Merit Sys. Protection Bd.*, 976 F.2d 1400, 1402- 03, 1407 (Fed. Cir. 1992) (affirming the Board's finding that a whistleblower's disclosure of an agency's repeated refusal to enforce regulations banning smoking in general office areas was a protected disclosure under the WPA).

(2006). The undisputed evidence in the record showed that suspension was unlawful in its entirety because all fabricated charges to suspend security clearance were rejected by the Defense Office of Hearing and Appeals (DOHA) and the Personnel Security Appeals Board (PSAB) directed DONCAF to reinstate Petitioner's security clearance and eligibility for assignment to sensitive position. It is evident that the appeals court opinion overlooked the undisputed evidence that the agency failed to follow procedural safeguards and violated agency-own procedures when it concluded at A9: "that the AJ did not err in holding that Dr. Stoyanov did not prove that the Navy did not follow its own regulations, and did not establish 'harmful error in the application of the agency's procedures in arriving at such decision,'" contrary to the irrefutable evidence in the record proving that procedural safeguards, agency-own procedures, and the Appellant's Right to Review Supporting Material were violated. In addition, the agency was not precluded from keeping Appellant on payroll since "[n]othing in 5 U.S.C. chapter 75 precludes an employee who has received a notice of proposed indefinite suspension, due to the suspension of his security clearance, from remaining on an agency's payroll until the suspension is effected". *See Boudousquie v. Department of the Air Force*, 102 MSPR 397 (2006) at ¶10. Although the appeals court acknowledged at A9: "Dr. Stoyanov also argues that the Navy violated its own internal regulations citing SECNAV M-5510.30 9-7, which relates to the Navy's internal procedures in suspending access to classified information for cause" it is evident that the agency failed to follow procedural safeguards and violated agency-own

procedures and Appellant's rights. The violations of the agency own procedures were obvious[2] because prior to the suspension from work without pay for more than 370 days Petitioner was denied internal appeal procedures and the security clearance adjudication process within the agency through which to object the adverse decision on security clearance issues. The appeals court decision in this case is clearly at odds with what was said in *Cheney,* 479 F3.d at 1352-53 and the Supreme Court decision in *Loudermill,* 470 U.S. 532, 546 (1985) holding that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

Accordingly, Petitioner respectfully submits this writ of certiorari to the Court to grant petition because of the precedent setting questions of exceptional importance and to restore justice.

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[2] The irrefutable evidence showed that AJ erred in facts and law finding "that the notice requirement had been met", which contradicted the finding of Board Chairman McPhie "that the appellant's 5 U.S.C. §7513 right to notice of the reasons for suspension of his access to classified information has been violated" in addition to the finding that "Appellant is entitled to back pay for the time period that he has been suspended without adequate notice of the reasons for the suspension of his security clearance" as found in the Separate Opinion at A21. The appeals court further misapprehended facts at A8 because AJ failed to find that the "Navy did not provide details" and nowhere did AJ held that "Dr. Stoyanov did not state that he was confused" while the undisputed evidence showed that Petitioner requested documents to make a meaningful response to the notice of security clearance suspension and to protect the evidence from being destroyed.

## CONCLUSION

Wherefore, in consideration of the above, Petitioner respectfully submits petition for a writ of certiorari for the Court's decision to grant the petition and vacate the appeals court decision that far departed from it's own opinion in *Cheney* and conflicted with the findings in the Separate Opinion of Board Chairman McPhie. Accordingly, the petition for a writ of certiorari should be granted.

Date 19 Feb 2010

Respectfully submitted,

Yuri Stoyanov

Yuri Stoyanov

## APPENDIX

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED. The mandate of the court will issue on November 30, 2009.

FOR THE COURT,
Jan Horbaly
Clerk

Dated: 11/23/2009
cc: Yuri J. Stoyanov
Russell A. Shultis
*Nov 23*, 2009
STOYANOV V NAVY, 2009-3163
(MSPB– DC0752080466-I-1)

NOTE: This disposition is nonprecedential.

**United States Court of Appeals for the Federal Circuit**

2009-3163

YURI J. STOYANOV,

Petitioner,

V.

DEPARTMENT OF THE NAVY,

Respondent.

Petition for review of the Merit Systems Protection Board in DC0752080466-I--1

DECIDED: September 15, 2009

Before MICHEL, Chief Judge, NEWMAN and MOORE circuit Judges.

PER CURIAM.

Dr. Yuri J. Stoyanov petitions for review of the final decision of the Merit Systems Protection Board "Board") sustaining the Department of the Navy's suspension of Dr. Stoyanov from his position, based on the suspension of his security clearance. The suspension lasted for over 370 days, ending with the reinstatement of his clearance through the Navy's appellate processes. The Board held that it had no authority to review the basis of the suspension and that it had no authority to review Dr. Stoyanov's charge that the suspension was improperly based on discrimination or on reprisal for whistleblowing. The

Board held that the Navy had met the requirements of minimal due process in its imposition of the suspension, and that this was the limit of the Board's review authority. Stoyanov V. Department of Navy, No. DC-0752M8~0466-1-1 (M.S.P.B. July 22, 2008). We affirm, for review of matters related to security clearance is limited to the question of due process in accordance with Department of the Navy. Egan, 484 U.S. 518 (1986).

## BACKGROUND

Dr. Stoyanov is employed as a Physicist/Scientist with the Naval Surface Warfare Center, Carderock Division. This position requires access to information classified as Secret. On February 2, 2007, Dr. Stoyanov received a "Notice of Intent to Suspend Access to Classified Information and Assignment to a Sensitive Position." The notice stated the reasons as "falsification of time and attendance records, misuse of government resources, and lack of candor when questioned regarding your misconduct." The notice identified the following acts:

a, On multiple occasions between February and May 2006, you used your government issued computer/email account to engage in communications with the HRSC, National Capital Region and Johns Hopkins University using the alias "Basil Stoyanov." By impersonating Basil Stoyanov, you misled representatives of the Department of Navy and Johns Hopkins.

b. On 28 September 2006, you signed in for duty at 0811 hours and disappeared until approximately 0855 hours. Subsequently, when questioned as to your whereabouts you claimed to be working in a classified

work area; however, no one in the area observed you working, your supervisor did not observe your working in this area, and the computer records for this secured computer disclose your first sign in time to be 1000, which is significantly later than you claimed,
c. On 22 December 2006 and 5 January 2007, you signed in earlier that) your actual arrival time, as observed by a witness.
d. You repeatedly ignore direction to limit your use of official time and you utilize government time and resources for unauthorized purposes '(in excess of 200 incidences).
Stoyanov v. Department of Navy, No. DC-0752-08-0466-l-1, Separate Opinion of Neil A. 0. McPhie at 2 (M.S.P.B. March 11, 2009). On February 5, 2007 Dr. Stoyanov requested the documentation to support these charges, and also requested thirty additional days to respond. On February 7, 2007, the Navy issued a "Notice to Indefinitely Suspend Access to Classified Information and Assignment to a Sensitive Position," by which the Navy suspended his security access. In this Notice, the Navy denied Dr. Stoyanov's requests for documentation and additional time, stating that he had received the statutory response period and that his response of February 5 did not address any of the concerns that had been raised in the February 2 Notice.

On February 9, 2007 Dr. Stoyanov again requested additional documentation and time, and stated that the suspension of his security clearance was in retaliation for his various EEO and whistleblowing claims against various Navy officials at his location. On February 15, 2007 the Navy issued a "Notice of Proposed Indefinite Suspension," which placed Dr.

Stoyanov in a non-duty status with pay for a 30 day period, pending a final determination regarding the suspension of his security clearance. The suspension of his security clearance was the reason cited for the indefinite suspension. This Notice stated that he could respond "in writing, in person, or both." From the record, it appears that he responded in writing. On April 9, 2007 the Navy placed Dr. Stoyanov on indefinite non-duty, non-pay status as of April 15, 2007.

The record does not contain details of the ensuing Navy procedures, However, Dr. Stoyanov advised that on April 10, 2008 the Department of the Navy Personnel Security Appeals Board, reviewing a decision dated March 11, 2008 of the Navy Central Adjudication Facility, reversed the revocation of his security clearance. His indefinite suspension was terminated, effective April 27, 2008, and he was directed to report for duty on May 5, 2008.

Meanwhile, Dr. Stoyanov had taken an appeal to the Board. A hearing was held on July 14, 2008, after which the administrative judge ("AJ") held that the Board does not have jurisdiction to inquire into the merits of a decision to suspend a security clearance. Thus the AJ held that he was precluded from considering whether the suspension of Dr. Stoyanov's security clearance was in retaliation for his EEO or whistleblowing actions. The AJ observed that the Board's authority was limited to review of whether Dr. Stoyanov had received due process from the Navy; that is, whether Dr. Stoyanov received notice of the charges against him and had the opportunity to reply. The AJ held that the reasons given to *Dr.* Stoyanov were

sufficient to enable a response, without the additional documentation and time that he requested. Accordingly, the AJ affirmed the Navy's suspension action.

Dr. Stoyanov petitioned the full Board for review. The full Board normally has three members, but had a vacancy and only two members participated in the review. These two members did not agree as to whether the Navy had provided sufficient detail of one of the four charges. In view of the split the AJ's decision became the final decision of the Board, in accordance with 5 C.F.R. §1200.3(b). This appeal followed.

ANALYSIS

Dr. Stoyanov argues that the Navy committed procedural flaws and that the Board erred, as follows: (1) the Navy's Notice of Intent was impermissibly vague; (2) the Board should have considered his whistleblowing reprisal claims; (3) he was improperly denied the information he needed to respond to the Navy's charges; (4) he was improperly denied the time extension he need to respond to the Navy's charges; (5) the Board failed to properly consider the Navy's violations of its own procedures and regulations as set forth in SECNAV M-551 0-30 9-7 2(b); (6) the Navy failed to provide him the requisite due process; and (7) the Navy's indefinite suspension was "unlawful in its entirety."

In Egan, supra, the Supreme Court considered the Board's authority to review an adverse employment action, when the action is based on the revocation or suspension of security clearance. The Court concluded that the Board lacks such authority, beyond

determination of whether there was minimal due process in connection with the suspension of clearance, and specifically, whether the agency provided the procedural protections specified in §7513(b). Egan, 484 U.S. at 530 ("An employee who is removed for 'cause' under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute,"). The Navy states that it followed the procedures set forth at §7513(b). These procedures apply to any federal employment action and relate to notice, the opportunity to reply, and to be informed of the decision and its reasons:

> (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> (3) be represented by an attorney or other representative; and
>
> (4) a written decision and the specific reasons therefor at the earliest practicable date.

5 U.S.C. §7513(b).

Notice under §7513(b) is sufficient if "it apprises the employee of the nature of the charges 'in sufficient detail to allow the employee to make an informed reply." King v Alston, 75 F.3d 657 (Fed. Cir. 1996) (quoting Brook v. Corrado, 999 F.2d 523, 526 (Fed. Cir. 1993:)). Brook requires that the employee have

"adequate notice" of the nature of the charges to which he must respond. 999 F.2d at 526. However, "[n]owhere does section 7513(b) require notice to include explicitly every element of every charge underlying the proposed action." Id. at 526-27. Dr. Stoyanov argues that the Notice contained insufficient detail, particularly as to the fourth itemized reason given by the Navy, which was that Dr. Stoyanov "repeatedly ignore[d] direction to limit your use of official time and you utilize government time and resources for unauthorized purposes (in excess of 200 incidences)." The Notice did not include details of any of the 200 incidences. Dr. Stoyanov argues that the Navy improperly denied him the time and the documentation he needed to respond to the Navy's charges. The AJ found that the notice requirement had been met, and that although the Navy did not provide details, Dr. Stoyanov did not state that he was confused about the basis of the Navy's charges against him.

Dr. Stoyanov also argues that the Board should have considered that his security clearance was revoked in retaliation for his whistleblowing activity, and that the Board should have addressed whether his disclosures constituted "protected disclosures" within the meaning of the Whistleblower Protection Act. The Board concluded that it lacked jurisdiction to review this aspect, citing this court's decision in Hesse v. Department of State, 217 F.3d 1372, 1377 (Fed. Cir. 1988), where this court applied Egan and held that "absent a clear indication from Congress that the Board was meant to review security clearance determinations when raised in an appeal under the Whistleblower Protection Act: of 1989], the principles

of Egan compel" a conclusion that the Board lacks such jurisdiction. Applying Hesse, the Board was correct in holding that it lacks jurisdiction to review whether a security clearance revocation was an act of retaliation for whistleblowing.

Dr. Stoyanov also argues that the Navy violated its own internal regulations, citing SECNAV M-55 10.30 9-7, which relates to the Navy's internal procedures in suspending access to classified information for cause. Dr. Stoyanov specifically identifies SECNAV M-55 10.30 9-7(2)(b), which provides "Commands and activities must report all suspensions [of access to classified information] to the DONCAF no later than 10 working days from the date of the suspension action via JPAS, providing sufficient details to support adjudicative review." Dr. Stoyanov argues that the report of his suspension was not sufficient 'to support adjudicative review" because the Navy "den[ied] evidence in support of adjudicative review."

The AJ held that "there is nothing in the record to even suggest that the agency failed to follow its own procedures in connection with the suspension of the appellant's security clearance." While agencies must follow the procedures in their own regulations, see Drumheller v. Department of the Army, 49 F.3d 1566, 1569-73 (Fed. Cir. 1995), we conclude that the AJ did not err in holding that Dr. Stoyanov did not prove that the Navy did not follow its own regulations, and did not establish "harmful error in the application of the agency's procedures in arriving at such decision." Romero y. Department of Defense 527 F.3d 1324, ~328 (Fed. Cir. 2008). Other than for review of the agency's procedures in the context of minimal due process, the

Board adhered to the prohibition against Board review of the suspension of the security clearance. See Egan, 484 U.S. at 520.

Substantial evidence supports the Board's finding that the Navy "has adduced preponderant evidence showing that it provided the appellant with the statutory/mandated due process to which he was entitled" as to the security clearance suspension. These requirements were when Dr. Stoyanov was apprised of the charges against him and afforded the opportunity to respond, as outlined in §7513(b). Although Dr. Stoyanov contends that the suspension of his security clearance and ensuing suspension of his employment with the Navy was "unlawful in its entirety," this charge is not within the Board's purview, beyond determination of whether he received the minimal due process to which he is entitled in accordance with Egan. The Board correctly so held. That decision must be affirmed.

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2009 MSPB 29

Docket No. DC-0752-08-04664-1

Yuri J. Stoyanov,
Appellant,
v.

Department of the Navy,
Agency.
March 11, 2009

Yuri J. Stoyanov, Fulton, Maryland, pro se.

David M. Caron, West Bethesda, Maryland, for the agency.

BEFORE
Neil *A. G.* McPhie, Chairman
Mary M. Rose, Vice Chairman
Chairman McPhie issues a separate opinion.

ORDER

¶1 This case is before the Board by petition for review of the initial decision which affirmed the agency's indefinite suspension action. The two Board members cannot agree on the disposition of the petition for review. 'Therefore, the initial decision now becomes the final decision of the Merit Systems Protection Board in this appeal. Title *5* of the Code of Federal Regulations, section 1200.3(b) (5 C.F.R. § 1200.3(b)). This decision shall not be considered as precedent by the Board in any other case. 5 C.F.R. § 1200.3(d).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United. States Court 'of Appeals
'for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

SEPARATE OPINION OF NEIL A. G. MCPHIE

in

*Yuri J. Stoyanov v. Department of the Navy*

MSPB Docket No. DC-0752-08-0466-I-1

¶1 This case stands at the intersection of *Department of the Navy v. Egan*,494 US. 518 (1988) and *Cheney* v. *Department of Justice*, 479 F.3d 1343 1351 (Fed. Cir, 2007). *Egan* mandates that the Board not review the underlying merits of an agency's decision to revoke an employee's security clearance. 484 U.S. at *529-532*. Under *Cheney*, 5 U.S.C. 7511(b) "entitles an employee to notice of the reasons for the suspension of his. access to classified information when that is the reason for placing the employee on enforced leave pending a decision on the employee's security clearance," 479 F.3d at 1351. In 'the instant case, the agency's notice of its intent to suspend the appellant's security clearance identified four reasons, three of" which were adequately detailed, and one of which was impermissibly vague. Under these circumstances, I believe the Board should find that the appellant's 5 U.S.C.7513(b) right to notice of the reasons for the suspension of his access to classified information has been violated. This is because the Board cannot find that the notice was adequate without also concluding, that the decision was justified by one or more of the three stated reasons 'that were adequately detailed. And such a determination would impermissibly run afoul of *Egan* by requiring the Board to decide the merits of a decision made on those grounds.

## BACKGROUND

¶2 The agency notified the appellant in February 2007 of its intent to suspend his access to classified information in a notice of intent that gave the following reasons:

> This action is being taken as a result of your falsification of time and attendance records, misuse of government resources, and your lack of candor when questioned regarding your conduct. Among the many other instances, the following actions demonstrate conduct involving question able judgment, untrustworthiness, and/or unreliability:
>
> a. On multiple occasions between February and May 2006, you used your government issued computer/email account to engage in communications with HRSC, National Capital Region and John Hopkins University using the alias "Basil Stoyanov." By impersonating Basil Stoyanov, you misled representatives of the Department of, the 'Navy and Johns Hopkins.
>
> b. On 28 September 2006, you signed, in for duty at 0811 hours and disappeared until approximately 0855 hours. Subsequently, when questioned as to your whereabouts, you claimed to be working in a classified work area; however, no one in the area observed you working, your supervisor did not observe you working in this area, and the computer records for this secured computer disclose your first 'sign in time to be 1000, which is significantly later than you claimed.
>
> e. On 22 December 2006 and 5 January 2Q07, you signed in earlier than your actual arrival time, as observed by witnesses.

d. You repeatedly ignore direction to limit your use of official time and you utilize government time and, resources for unauthorized purposes (in excess of 200 incidences).

Initial Appeal File (IAF) Tab 4aa at 1-2. The notice gave the appellant three day from the date of the notice to respond. *Id.* at 2.

¶3 The appellant's requests for documents supporting the allegations contained in the notice and for a thirty-day extension of time within which' to reply were denied. IAF Tabs 4z, 4y. The appellant made no substantive reply to the proposed security clearance suspension notice. The appellant's access to classified information was, then indefinitely suspended pending a final security clearance determination by the Department of the Navy Central Adjudication Facility (DONCAF). The appellant then received a Notice of Proposed Indefinite Suspension that identified the suspension of his security clearance as the basis for the proposed action and afforded the appellant certain rights, including "the right to review the material relied upon to support the reasons given in this advance' notice of the proposed disciplinary action." IAF Tab 4v. The agency responded to the appellant's subsequent request for the "material relied upon" by providing only the two notices it had previously issued to him in, connection with its decision to suspend his security clearance. IAF Tabs 4o, 4n, 4m, 41. The appellant made no response other than to continue claiming his procedural rights were violated by the agency's failure to provide documents supporting its allegations, and to assert broadly that all of the

charges were fabricated.

## ANALYSIS

¶4 In a case such as this, involving a suspension resulting from the suspension of a security clearance, the Board's review is limited. The Board may not review the underlying merits of an agency's decision to revoke an employee's security clearance. *Egan* 484 U.S. at *529-532.* The Board may only "determine whether a security clearance was denied, whether the security clearance was a requirement of the appellant's position, and whether the procedures set forth in section 7513 were followed," *Hesse v. Department 'of State,* 217 F.3d 1372 (Fed, Cr. 2000).[1]

¶5 5 U.S.C. 7513(b) "entitles an employee to notice of the reasons 'for the suspension of his access to classified information when that is the reason for placing the employee on enforced leave pending a decision on the employee's security clearance," *Cheney,* 479 F.3d at 1351. Moreover, the reasons provided must give the employee "enough information to enable him or her to make a meaningful response to the agency's proposed suspension of the security clearance." *Id.* at 1352.

¶6 The parameters of what constitutes adequate notice of the reasons for the suspension of access to

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[1] These limited grounds for' review were recently expanded to include whether the' agency followed its own internal procedures. "'In the event that an agency 'does not follow its own regulations, 5 U.S.C. § 770 l(c)(2)(A) provides that an adverse action decision may not be sustained by the Board if the employee can show 'harmful error in the' application of the agency's procedures in arriving at the decision.'" *Romero v. Department of Defense,* 527 F.3d 1324, 1328 (Fed. Cr. 2008). I do not believe the appellant has raised an appealable issue with respect to that requirement.

classified information have been explored by the Federal Circuit in a very few casts. In *King* v. *Alston*, 25 F.3d 657, 661 (Fed. Cir. 1996). it was deemed sufficient that the employee was advised that "he may suffer from a medical condition which requires further investigation and evaluation." 75 F.3d at 659. As the court explained, "Alston was thus able to focus his response, on his medical status, rather than to have to guess whether the agency's action was based on disloyalty, unreliability, Or other possible ground." *Id.* at 662. Significantly, the' agency invited the employee to' submit 'medical documentation, and he did so. He also did not assert that he had inadequate information to make an informed reply. *Id.* Thus, although the notice rather broadly categorized the issue as Alston's medical condition, it was apparent, that both parties knew specifically to what that reference related.

¶7 The Federal Circuit has also deemed sufficient a notice "which set forth 'at length, and in detail, the derogatory information . . . consist[ing] of fifty-five separate alleged incidents." Thy v. *Nuclear Regulatory Commission,* 264 F. App'x 889, 891 (Fed'. Cir. 2008) (quoting the ID; brackets in original). Furthermore, the notice "contained nineteen pages setting forth the exact dates and the conduct alleged in connection with each allegation." *Id,* The appellant responded orally and by providing exhibits. *Id.*

¶8. Information provided to an employee by original and supplemental notices was deemed inadequate in *Cheney*. In that case, the employee was first notified that the proposed suspension of his security, clearance was "based on allegations of

potentially derogatory personal conduct and possible violations of law and DEA Standards of Conduct" and his failure "to comply with security regulations and [his] . . . demonstrate[ion] [of] a pattern of dishonesty and/or rule violations!" 479 F.3d at *1345*. This notice was later supplemented by the 'further clarification that the employee "inappropriately queried or caused to be queried Law Enforcement Data Bases and abused the Administrative Subpoena process.. Additionally, it is believed that you are in violation of the confidentiality agreement you entered into with the Office of Professional Responsibility during their investigation into these issues." *Id.* at 1346.

¶9. The Federal Circuit found this notice to be inadequate to satisfy § 7513(b). According to the court, the initial, notice, provided "no indication of when his alleged conduct took place or what it involved." *Id.* at 1352. The supplemental information did not cure the deficiency. He was not told "what the nature of his alleged derogatory personal conduct was", or "what Jaws and DEA standards of conduct he had violated, or when he had allegedly improperly caused the database to be' queried." *Id.* at 1353, The court also concurred in the Board's undisputed findings that the agency "did not identify any specific queries of the data base [sic] nor did the agency describe the, manner in which [Mr. Cheney] abused the administrative subpoena process." *Id.* at 1352 (quoting the ID; bracketed text in the original). The supplemental information "was akin to informing Mr. Cheney that his security clearance was being suspended because he had robbed a bank, without telling him where the bank was and when he had robbed it,

particularly in view of the fact that it is undisputed that Mr.' Cheney regularly had reason to cause the database to be queried." *Id.* at 1352-53.

¶10. Because the agency failed to meet the procedural requirements of 5 U.S.C. *7513,* the employee's "indefinite suspension was therefore improper, and he [was] entitled to recover back pay for the period of the improper suspension." *Id.* at 1353.[2]

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[2] The Board has passed on the adequacy of notice of the reasons for the suspension of an employee's security clearance in a number of cases. They add little to the analysis. however. The Board found notice to be adequate in each case, based either on a single identified incident or a detailed explanation of multiple reasons, None of the cases addressed the circumstance here, where certain reasons 'were clear and another was not. The cases do, however, suggest that there is ample Board precedent from which an agency could conclude that it will not run afoul of its notice obligations so. long as it provides clear and detailed explanations of the reasons for its decision. *See Lebray v. Department of the Navy,* 52 M.S.P.R. 468 (1994) (the appellant was provided with "detailed listing of the reasons for the actions"); *Barcliff v. Department of the Navy, 62* M.S.P.R. 428 (1994) (the appellant was notified that security clearance suspension was due to his conviction on five counts of forgery); *S/inmate v. Department of the Navy, 62. MLSPR 1351* (1994) (the appellant was informed that 'his security clearance would be suspended due to his arrest on drug charges); *Byerline, v. Department of the Navy, ~ M.S.P.R* 279 (1994) (the appellant was informed "in detail of the reasons for the suspension of his security access"); *McGinn* v. *Department of the* Navy~ 52 M.S.P.R. 211 (1994) (the appellant was given a two-page detailed memorandum setting Out "derogatory conduct" on' which the security clearance suspension was based); *Chapman* it. *Department of the Navy,* 62 M.S.P.R. 267 (1994) (the appellant was notified that his security clearance would be revoked because of his alcohol abuse); *Barnett* v. *Department of the Navy,* 62, M.S.P.R. 233 (1994) (the appellant was provided with a "'detailed listing of the reasons for its action"); *Smallwood* it. *Department of the Navy,* 52 M.S.P.R. 221 (1994)(The agency notified the

¶11. In the instant case, the appellant was notified that his security clearance would be suspended based on several distinct reasons described more generally as "falsification of time and attendance records, misuse of government resources, and [the appellant's] lack of candor when questioned regarding" the conduct. tAP Tab 4aa at 1. Of the four listed reasons, those described in Subparagraphs are sufficiently specific to allow a meaningful response. However, reason "d" is at least as vague as the reasons contained in the notice deemed inadequate in .*Cheney*. On the face of the notice, there is no way to discern what the agency has in mind when it alleges that the appellant "repeatedly ignore,[s] direction to limit [his]. use of official time and [he] utilizes government time and resources for unauthorized 'purposes (in excess of 200 incidents)." Thus, the appellant was told that he utilized government

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appellant that. it had received evidence showing that he had two criminal convictions, and that he was presently awaiting trial based on the, charge of "felon possession of a firearm."); *Bolden* it. *Department of the Navy*, 62 M.S.P.R. 151 (1994) (the appellant was 'notified that he had been recently convicted of "Discharging Firearm In Building."); *Mamas* it. *Department of the Navy* 62 M.S.P.R. 117 (1994) (the appellant was notified that his security clearance would be revoked because he was found guilty of selling anabolic steroids); *Riley v. Department of the Navy*, 62 M.S.P.R. 105 (1994) (the appellant was notified that the action was taken due to his arrest for possession of cocaine); *Germino* it. *Department of Defense*, 61 M.S.P.R. 683 (1994) (The agency attached to the removal proposal notice two investigative memoranda describing the alleged underlying misconduct); *Kriner v. Department of the Navy*, 61 M.S. P R. 526 (1994) (the appellant was provided with a driving record abstract showing violations involving driving under the influence of alcohol).

time and resources for unauthorized purposes, but he was not told when be *was* alleged to have done so, which government resources he allegedly utilized, and what the alleged unauthorized purposes were. To the extent past communications between the parties should also be considered in assessing the extent of the notice, the record '1 shows that the appellant received a three day suspension in November 2005 for two specifically enumerated instances of misusing official time, and government resources, JAF Tab 4ac. But that notice, issued over a year before the security clearance suspension, inadequately illuminates the later allegations of far more extensive and unidentified unauthorized use of government time and resources. Consequently, the appellant could not' have meaningfully responded 'to the allegation.

¶12 The legal question in this case is therefore whether a notice identifying four bases for suspending an appellant' s security clearance, 'three of which are sufficiently specific and one of which is not, is adequate in its entirety. I believe that the board must conclude that it is not, or risk impermissibly delving into the merits of the security clearance determination. The agency chose to identify all four reasons together as the bases for the suspension of the appellant's security clearance, and did not indicate whether any one or more of them alone would have led it to take the same action. There is therefore no basis for the Board to reach any judgment in that regard without also passing on the adequacy of one or more reasons as the basis for the decision to suspend the security clearance. That would be

tantamount to an impermissible inquiry into the merits of the decision.

¶13 There is evidence in this case that the agency and the appellant have a history of discussing the issues that were only vaguely referenced in the notice. Under these circumstances, rather than finding on the current record that the appellant is entitled to back pay for the time period that be has been suspended without adequate notice of the reasons for the suspension of his security clearance, I would remand the case to allow the agency to supplement the record to show that in the context of prior communications, the notice was adequate.

Neil A. G, McPhie
Chairman

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE
DOCKET NUMBER
DC-0752-08-0466+I+1

YURI J. STOYANOV,
Appellant,

V.

DEPARTMENT OF THE NAVY,
Agency.

DATE: July 22, 2008

Yuri J. Stoyanov, Fulton, Maryland, pro se.

David M. Caron, Esquire, West Bethesda, Maryland,

for the agency.

BEFORE
Raphael Ben-Ami
Administrative Judge

## INITIAL DECISION

The appellant on April 26, 2008, appealed his indefinite suspension, which became effective on April 15, 2007, and continued until April 27, 2008. The Board has jurisdiction over this appeal. *See* 5 U.S.C. §7511-7513, 7701. The appellant's requested hearing was held on July 14, 2008. For the reasons discussed below, the agency's action is AFFIRMED.

## BACKGROUND

The appellant is employed as a Physicist Scientist with the agency's Naval Surface Warfare Center, Carderock Division. It is undisputed that the appellant's position requires the incumbent to have access to classified information to the Secret Level. By memorandum dated February 7, 2007, the agency suspended the appellant's access to classified information and assignment to a sensitive position pending a final security clearance determination by the Department of the Navy Central Adjudication Facility (DONCAF). *See* Appeal File (AF),, Tab 5, Subtab 4y. The agency thereafter proposed and ultimately effected the appellant's indefinite suspension from his position pending a final decision by DONCAF. *See Id.*, Subtabs 4h, 4v.

The appellant asserts that his indefinite suspension "was unlawful because the agency deciding

officials violated laws, committed harmful errors, failed to follow agency own procedure, deliberately misrepresented facts, and retaliated against [him] for [his] participation in protected activities."[1] AF, Tab 26 at pages 1-2.

## ANALYSIS AND FINDINGS

### Burden of Proof

The agency has the burden to prove by preponderant evidence that it provided the appellant with the requisite procedural protections in connection with its indefinite suspension action. Preponderance of the evidence is defined by regulation as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See 5* C.F,R. §120 1.56(c)(2). The agency has proven by preponderant evidence that it provided the appellant with the requisite procedural protections.

It is well settled that the Board's authority to review matters relating to security clearance determinations is limited. *See Norrup v. Department of the Navy*, 87 M.S.P,R. 444, 446 (200!). Review of the

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[1] The appellant makes no claim of entitlement to reassignment to non-sensitive duties during the period of his suspension, and the record in any event shows that the agency has no policy, manifested by regulations, requiring such reassignment, *See* AF, Tab *5*, Subtab 4ad; *Hesse v. Department of State*. 82 M.S.P.R. 489, 492 (1999), *aff'd*, 217 F.3d 1372 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1154(2001). The agency also in its proposal notice pointed out that there were no non-sensitive positions within the Command to which the appellant could be reassigned, *See* AF, Tab 5, Subtab 4v at page 2.

merits of an agency's decision to deny, suspend or revoke a security clearance is not within the Board's jurisdiction' under S U.S.C. *§* 75 13(d). *See Id.* However, an employee who is subjected to an adverse action within the meaning of 5 U.S.C. *§* 7512 because of a decision regarding a security clearance is entitled to the procedural protections provided by *5* U.S.C. *§* 7513, even though he is not entitled to a review of the merits of the security clearance determination. *See id.* (citing *Hesse* v. *Department of State,* 217 F.3d 1372 (Fed. Cir. 2000); *Department of the Navy* v, *Egan,* 484 U.S. 518. 530-31 (1988)).

When an agency action based on the denial, suspension, or revocation of a security clearance is challenged under the provisions of chapter 75 of title *5,* the Board may determine whether a security clearance was suspended or denied, whether it was a requirement of the appellant's position, and whether the procedures set forth at 5 U.S.C. *§* 7513 were followed. *See Norrup,* 87 M.S.P.R. at 446 (citing *Hesse,* 217 F.3d at 1376). An agency may indefinitely suspend an employee pending a final determination of whether his security clearance should he revoked. *See id.* (citing *Jones v. Department of the Navy,* 978 F.2d 1223, 1226 (Fed, Cir. 1992)).

Accordingly, where, as here, a security clearance that is a requirement of an employee's position has been suspended, the Board's review of an adverse action following the suspension of the security clearance is limited to considering whether the affected employee was provided with the following procedural protections: (1) At least 30 days' advance written notice stating the specific reasons for the proposed action; (2) a reasonable time to answer orally and in writing and to furnish affidavits and other

documentary evidence in support of the answer; (3) the opportunity to be represented; and (4) a written decision and the specific reasons therefor *See Drumheller v. Department of the Army,* 49 F.3d *1566,* 1571 (Fed. Cir. 1995). The requirements of section 7513 are met if the notice provides the employee with an adequate opportunity to make a meaningful reply to the agency before being suspended. *See King v. Alston, 75* F.3d 657, 661 (Fed. Cir. 1996). Issues that extend beyond the scope of these requisite due process rights are not material factual issues that are reviewable by the Board.[2] *See Germino v. Department of Defense,* 61 M.S.P.R, 683, 689 (1994), *aff'd,* 52 F.3d 345 (Fed. Cir,) (Table), *cert. denied,* 516 U.S. *930* (1995).

However, the U.S. Court of Appeals for the Federal Circuit in *Romero v. Department of Defense,* 527 F.3d 1324, 1328 (Fed. Cir. 2008), noted that 5 U.S.C. *§* 7513 "is not the only source of procedural protections for employees subject to adverse actions based on security clearance decisions; agencies must also follow the procedures established by their own regulations." The court further noted that "[un the event that an agency does not follow its own regulations, 5 U.S.C. *§* 770 l(c)(2)(A) provides that an adverse action decision may not be sustained by the Board if the employee can show 'harmful error in the application of the agency's procedures in arriving at such decision'."[3] *Id.* Thus, "the Board [also] may review

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[2] The Board therefore is precluded from reviewing allegations of discrimination or reprisal for whistleblowing or other protected activity in connection with a security clearance related appeal. *See Hesse,* 82 M.S.P.R. at 493; *Hinton v. Department of the Navy,* 61 M.S.P.R. 692, 697 (1994).

[3] Under section 770 l(c)(2)(A), it is the employee's burden to show that the agency failed to follow its own procedures in reaching a

whether the agency has complied with its procedures for revoking a security clearance, even though it may not review the substance of the revocation decision." *Id.* at 1329.

It is undisputed that the appellant's position requires a security clearance, the appellant's access to classified information and assignment to sensitive duties had been suspended, and the appellant was indefinitely suspended for that reason until a final decision was reached regarding the status of his security clearance. Moreover, the record shows that the agency afforded the appellant his adverse action procedural rights under 5 U.S.C. § 75 13(b) in effecting his indefinite suspension—i.e., he received advance written notice of the allegations against him, a reasonable time to respond orally and in writing, an opportunity to be represented, and a written decision explaining the basis for the agency's action. In that connection, the agency's detailed and specific notices to the appellant explaining the bases for the suspension of his security clearance provided him with an adequate opportunity to make a meaningful reply to the allegations against him before being suspended. Thus, the appellant is entitled to no further Board review of the merits and procedures used under 5 U.S.C. chapter 75 to effect his indefinite suspension. In addition, the agency's suspension action clearly promoted the efficiency of the service as the appellant

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decision regarding an appealable adverse action and that the procedural deficiency constituted harmful error. Harmful error under 5 U.S.C. § 7701(c)(2)(A) cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

was unable to perform his job without access to classified information and eligibility for assignment to sensitive duties. Finally, there is nothing of record to even suggest that the agency failed to follow its own procedures in connection with the suspension of the appellant's security clearance.

In sum, I find that the agency has adduced preponderant evidence showing that it provided the appellant with the statutorily mandated due process to which he was entitled with respect to his indefinite suspension. The agency's indefinite suspension action therefore must he affirmed.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:
Raphael Ben-Ami
Administrative Judge